(12)

No. 87-1661

In The
Supreme Court of the United States
October Term, 1988

ASARCO INCORPORATED, *et al.*,
Petitioners,

v.

FRANK KADISH, *et al.*,
Respondents.

On Petition for Writ of
Certiorari to the Arizona Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICI CURIAE, ALASKA MINERS ASSOCIATION, SOUTHWESTERN MINERALS EXPLORATION ASSOCIATION, AND GSA RESOURCES, INCORPORATED, IN SUPPORT OF PETITIONERS

Of Counsel

JAMES S. BURLING
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

30pp

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED—Continued

No. 87-1661

In The

Supreme Court of the United States

October Term, 1988

ASARCO INCORPORATED, *et al.*,

Petitioners,

v.

FRANK KADISH, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Arizona Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTRODUCTION

This Court granted the Petition for Writ of Certiorari of ASARCO Incorporated, *et al.*, on October 10, 1988. Movants, Alaska Miners Association (AMA), Southwest Minerals Exploration Association (SMEA), and GSA Resources, Incorporated (GSA) (collectively referred to as Miners), previously moved this Court for, and obtained, permission to file a brief amicus curiae in support of ASARCO's petition for writ of certiorari.

Again, movants obtained permission from petitioners to file this brief amicus curiae in accordance with Supreme Court Rule 36.2. A letter of consent has been lodged with the clerk of the Court. Miners have attempted to obtain permission from the State of Arizona and the respondents to file the attached brief amicus curiae in support of petitioners. Respondents consented to participation by AMA and SMEA, but not GSA Resources. *See* consent lodged with the clerk. Permission from the state has not been forthcoming.

Miners seek leave of this Court to file the attached brief amicus curiae pursuant to Supreme Court Rule 36.3.

Miners represent a range of interests that have a vital stake in the proper interpretation of the New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557, and the Jones Act of 1927,[1] Pub. L. No. 570, ch. 57, 44 Stat. 1026 (codified as amended at 43 U.S.C. § 870). The interests of Miners are described in more detail below.

A. The Alaska Miners Association

AMA is a nonprofit, membership industry association. AMA has approximately 1,500 members, most of whom reside throughout the State of Alaska. AMA is active in supporting and defending a balanced approach towards the regulation and leasing of mining claims. Towards this end, the Alaska Miners Association previously filed in this Court an amicus brief in support of ASARCO's petition for writ of certiorari in this case,

---

[1] Also known as the School Lands Act of 1927.

and an original petition for writ of certiorari in the analogous case, *Trustees for Alaska v. State of Alaska,* 736 P.2d 324 (Alaska 1987), *cert. denied,* 100 L. Ed. 2d 2013 (1988) (on issue of whether Alaska Statehood Act mandates a particular type leasing system).

A proper understanding of the predecessor legislation, the Jones Act, will support the creation of a reasonable leasing system in Alaska that will ensure proper benefits to the state without unduly burdening the Alaska minerals industry.

B. Southwestern Minerals Exploration Association

The Southwestern Minerals Exploration Association is a group of mineral exploration professionals who are actively involved in the shaping of natural resource development public policy. The association has been active in promoting and supporting legislation at the state level and in fostering better relationships with state land user groups. The association believes that the Supreme Court's decision will result in higher royalty rates and highly uncertain maximum levels of lease payments. This in turn will discourage mineral exploration and production from state mineral lands in Arizona. Instead, the emphasis for exploration would shift towards the remaining federal lands in Arizona and lands in other states and nations.

As a direct result of the Arizona Supreme Court's decision at least one member of the Southwestern Minerals Exploration Association has lost substantial business when an outside investor withdrew from a lease development program because of the uncertainties created by the court's decision.

C. GSA Resources, Incorporated

GSA is a small family owned and operated mineral consulting and mining company. In terms of finances and resources, it is in an entirely different class of mining company compared to ASARCO. As such, GSA does not believe that its interests can be completely represented by the larger mining companies. The impacts from an adverse interpretation of the Arizona leasing laws will be felt much more directly by small companies like GSA. GSA is operating leases on 1,659.26 acres from the State of Arizona.[2]

GSA has no assurance that if it continues to comply with the preexisting statutory duties with regard to these leases that it will be permitted to retain any interest in these leases, or if they might be auctioned to the highest bidder as implied by the Supreme Court. Finally, GSA has no way of knowing whether it has any property rights left in its leases or if those leases are a complete nullity. About all that is certain is that the royalty rate, found by the Arizona Supreme Court not to be based on fair market value, will rise with an adverse effect on the viability of GSA's mining operations. In short GSA is in the untenable position of having to meet its obligations on its leases while not knowing what return, if any, it will receive from those leases.

———o———

[2] In order to obtain financing and bonding, the leases are personally owned by the family owners of GSA who are personally liable for any financial obligations.

CONCLUSION

There is a growing tendency for state courts to assume the prerogatives of legislative decision making for state land mineral leasing systems. Unfortunately, without the benefit of the legislative process, the consequences of this judicial legislation have been harsh for citizens who depend on mineral leasing on state lands. Movants for amici curiae status represent a varied class of individuals in the mining community, both inside and outside of Arizona, who will be affected by the adverse precedent established by the Arizona decision.

Movants represent the small mining community, which has a unique perspective on prospecting and mining on state lands. This perspective is not the same as that held by the large multinational mining companies already participating in this suit. For these reasons, Miners respectfully request leave to file the attached brief amicus curiae.

DATED: November 23, 1988.

Respectfully submitted,

Of Counsel

JAMES S. BURLING
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

By _____
ROBIN L. RIVETT
Attorneys for Amici Curiae

No. 87-1661

In The
Supreme Court of the United States
October Term, 1988

ASARCO INCORPORATED, *et al.*,
Petitioners,
v.
FRANK KADISH, *et al.*,
Respondents.

On Petition for Writ of
Certiorari to the Arizona Supreme Court

BRIEF OF AMICI CURIAE OF ALASKA MINERS ASSOCIATION, SOUTHWESTERN MINERALS EXPLORATION ASSOCIATION, AND GSA RESOURCES, INCORPORATED, IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI

The interests of amici are outlined in the motion for leave to file brief amicus curiae.

OPINIONS BELOW

The decision of the Supreme Court of Arizona is reported in *Kadish v. Arizona State Land Department,* 747 P.2d 1183 (Ariz. 1987). The decision was issued on December 10, 1987, and reconsideration denied February 2, 1988. The Arizona Supreme Court's decision was from an appeal of a ruling by the Maricopa County Superior Court in *Kadish v. Arizona Land Department,* Case No. C433745. Both opinions are reproduced in ASARCO's appendix to its petition for writ of certiorari. The petition for writ of certiorari was granted October 10, 1988, and reported at 109 S. Ct. 217 (1988).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

STATUTES INVOLVED

Amici adopt petitioner ASARCO's statement of the statutes involved.

STATEMENT OF THE CASE

Arizona received nonmineral lands with statehood in 1910. These lands were for the benefit of a school lands trust. In 1927, Congress further granted mineral lands to Arizona. The 1927 legislation contained a provision that minerals must be leased "as the State legislature may direct."

Pursuant to this statute, Arizona established a leasing system for mineral deposits on state lands whereby the state collects 5% net royalties on mineral production. Respondents, Kadish, *et al.*, brought suit alleging that the royalty system violates the 1910 statehood enabling legislation because insufficient royalties are collected, and there are appraisal and auction requirements for mineral lands.

Respondents and amici believe that any leasing restrictions found in the 1910 legislation do not apply to mineral deposits. Kadish initially lost before Maricopa County Superior Court, but the Arizona Supreme Court reversed, holding that the present lease system violates the Enabling Act.

———o———

SUMMARY OF ARGUMENT

When Congress granted nonmineral lands to Arizona in 1910, it did not provide for the disbursement of mineral deposits subsequently discovered on those "nonmineral" lands. To remedy the problem of distinguishing "mineral" from "nonmineral" lands, Congress in 1927 granted to

the western states all school section lands whether they were nonmineral or mineral. Congress provided that minerals were to be leased "as the State legislature may direct," Congress did not extend the burdensome restrictions found in the 1910 Enabling Act to these mineral lands.

To impose restrictions, such as those for appraisal and auction, to mineral deposits would foreclose mineral development and reduce the value of the school lands trust in Arizona.

———o———

REASONS FOR REVERSING THE DECISION BELOW

A. The Leasing of State Mineral Lands Is Subject to Complete Legislative Jurisdiction

The Arizona Supreme Court's attempt to redefine Arizona's mineral leasing system is in large part a result of that court's basic failure to understand the distinction between mineral and nonmineral lands in the New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557, and the Jones Act of 1927, Pub. L. No. 570, ch. 57, 44 Stat. 1026 (codified as amended at 43 U.S.C. § 870). To put it succinctly, Congress granted the new State of Arizona only nonmineral lands under the 1910 Enabling Act, while it granted mineral lands in the 1927 Jones Act. The nonmineral lands are and always have been the subject of the appraisal and auction requirements found in the 1910 Act; the mineral lands were made expressly subject to the leasing provisions in the 1927 Act. No subsequent amendment to the Enabling Act encumbered the

leasing of mineral lands with any appraisal and auction requirements.

No state or federal legislative body ever considered placing appraisal and auction requirements upon mineral deposits. In 1910 such requirements were not considered with respect to minerals because the underlying assumption was that no mineral lands would be granted to the states. By the time 1927 and the Jones Act arrived it was perfectly clear that the states had mineral deposits—and then Congress ruled that mineral deposits must be treated differently and leased "as the State legislature may direct." There is no evidence that Congress intended that mineral leasing be burdened with the 1910 Enabling Act restrictions. Indeed, for Congress to have placed appraisal or auction requirements upon mineral deposits would have been totally antithetical to the discovery and development of such deposits.

B. The Distinction Between Mineral and Nonmineral Lands Is Crucial to an Understanding of Leasing Requirements

The distinction between mineral and nonmineral lands is crucial not only in Arizona, but in other western states as well. For example, in *Trustees for Alaska v. State of Alaska,* 763 P.2d 324 (Alaska 1987), *cert. denied,* 100 L. Ed. 2d 2013 (1988), the Alaska Supreme Court correctly found that nonmineral lands, *i.e.,* those lands not known to have been of mineral character at the time they were selected by the State of Alaska, are not subject to the mineral leasing provisions of Section 6(i) of the Alaska Statehood Act, 72 Stat. 339 (1958), codified at the note preceding 48 U.S.C. § 21. Instead, nonmineral lands are subject

to the same provisions for all general grant lands found in Sections 6(a) and 6(b) of the Alaska Statehood Act just as nonmineral lands in Arizona are subject to the 1910 Enabling Act requirements that include appraisal and auction.[3]

C. Subsection (b) of the Jones Act Provides the Complete Mechanism for Leasing Mineral Lands

The leasing of nonmineral lands granted pursuant to the 1910 Enabling Act is treated in full in that Enabling Act, and include, among other things, an appraisal and auction requirement. When Congress granted mineral lands to the states with the 1927 Jones Act, it expressly left to the states the details of leasing of those minerals. The Arizona Supreme Court ignored this express language, and instead treated the mineral lands granted in 1927 just the same as nonmineral lands granted in 1910. In doing so, the Arizona Court misinterpreted the structure of the Jones Act.

Subsection (a) of the Jones Act provides that the "grant of numbered mineral sections under this section shall be of the same effect as prior grants." Subsection (b) of the Jones Act contains the clause that gives the state legislatures authority to lease minerals as they may direct. The Arizona Supreme Court interpreted the

---

[3] Lands on which minerals were found after they were acquired by Arizona (or other western states) are not transformed into "mineral" lands; they remain nonmineral. *See, e.g., State of Wyoming v. United States,* 255 U.S. 489, 498 (1921); *United States v. Sweet,* 245 U.S. 563, 572-73 (1918). As for how mineral deposits on such "nonmineral" lands in Arizona are to be treated, see Part C.3 below.

general provisions of Subsection (a) of the Jones Act to have imposed certain Enabling Act requirements upon mineral leases thereby eviscerating the subsequent, more specific, and more liberal leasing provisions of Subsection (b). This is incorrect for several reasons.

1. The Language of the Jones Act Cannot Be Ignored

Words in statutes should not be read to be mere formalism without substance. *See, e.g., Inhabitants of Montclair Township v. Ramsdell,* 107 U.S. 147, 152 (1883) (interpretation of bonding statute); 2A *Sutherland Statutory Construction* § 4606 (4th ed. 1984). In this case, the words in the Jones Act that mineral lands are to be leased "as the State legislature may direct" cannot be ignored and parsed of all meaning.

2. Congress Never Intended to Impose Auction and Appraisal Requirements upon Mineral Leases

Second, Congress never intended to apply the restrictive appraisal and auction requirements to mineral deposits. In 1910 those requirements did not apply because mineral lands were not at issue. Indeed, when the Arizona Supreme Court stated there is "no congressional intent to remove the appraisal, trust, and true value restrictions from mineral leasing," 747 P.2d at 1194, it was wide of the mark. Congress had never expressed any intent to impose those requirements upon mineral leases in the first place.

Furthermore, by 1927 Congress had backed away, somewhat, from its excessive paternalism of 1910. Instead deference was made to the states' "business judgment,"

68 Cong. Rec. 1820 (1927), and the states were assumed to be "zealous and just as jealous of the public school fund as the federal government can be." Hearings on S. 564 before the House Committee on Rules, 69th Cong., 2d Sess. 6 (1926). *See* extended discussion in ASARCO's petition for writ at 13.

3. Subsection (a) of the Jones Act Did Not Establish any Substantive Restrictions on the Patent of Mineral Lands

Subsection (a) of the Jones Act protects third party rights in land to be transferred to the states; it does not incorporate the 1910 leasing restrictions.

While the 1927 Act granted mineral land to the states, it did not provide an actual mechanism for transfer of title to the states. That was accomplished in 1934. *See* Act of June 21, 1934, 48 Stat. 1185, 43 U.S.C. § 871 (repealed by Pub. L. No. 94-579, 40 Stat. 2792). In the 1934 legislation Congress provided that all land patents shall show "the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any." This sort of language is the logical consequence of Subsection (a) of the Jones Act ("same effect as prior grants"). Without evidence that any mineral land patents actually contain the "appraisal and auction" conditions or limitations discovered by the Arizona court, such restrictions should not be implied.

4. Subsequent Legislation Demonstrates That Congress Believed That the "Appraisal and Auction" Requirements of the 1910 Enabling Act Were Not Applicable to Mineral Deposits Given to the State in the 1910 Act

When Congress amended the Enabling Act in 1936 the legislative history demonstrates that Congress knew that the nonmineral lands granted in the Enabling Act were not subject to *any* lease provisions. In S. Rep. No. 90, 70th Cong., 1st Sess. 4 (1928) (Appendix Item VI), Secretary of the Interior, Hubert Work, stated: "[B]ut no provision was made in the [Enabling] Act for the development or protection of minerals on state lands." In other words, nonmineral lands that had been granted by the Enabling Act could not be properly leased for minerals. Nor could such nonmineral lands be subject to the lease provisions of the Jones Act: "The provisions of this Act of 1927 would not apply to lands or minerals therein that might be granted under the Act of June 20, 1910." *Id.*[4]

In order to remedy this situation, the 1936 amendments were passed to provide a mechanism for the leasing of such nonmineral lands which contained minerals. *See* Act of June 5, 1936, ch. 517, 49 Stat. 1477 (providing for the leasing "as the State legislature may direct" of "said lands for mineral purposes"). This amendment did *not* set up a lease system for these lands with an appraisal and auction requirement. It set up a lease system for these nonmineral lands just like the lease system found in the

---

[4] Work also discussed what the leasing provisions of the Jones Act were, namely leasing as "the State legislature may direct," the creation of a trust, and a provision for forfeiture. *Id.* Notably absent is any discussion of appraisal or auction.

Jones Act, with the Legislature directing the leasing. Nor did the 1936 Act affect in any way the provisions of the Jones Act. It did not impose any new lease conditions upon the mineral lands granted in the Jones Act. In fact, there is no evidence that Congress found a need or meant to apply the 1936 amendments to the Jones Act mineral lands. Congress simply provided the identical method for all classes of mineral bearing lands: "as the State legislature may direct."

5. A Contemporaneous Reading of the 1936 Amendment Supports Liberal Interpretation of the Jones Act Mineral Leasing Provisions

Furthermore, a contemporaneous reading of the 1936 amendment is provided by the 1940 mineral leasing statute enacted by the Arizona legislature. Long continued and contemporaneous practical interpretations of a statute by the executive officers charged with its administration and enforcement and by the public constitutes an invaluable aid in determining the meaning of a doubtful statute. 2A *Sutherland Statutory Construction* § 49.03; *Edwards' Lessee v. Darby*, 25 U.S. 206, 210 (1827). That statute, Chapter 78, Laws of Arizona, at Section 4(b), established a royalty rate of "five per cent of the net smelter or mint returns." This has been the long-standing law for nearly a half century. It has provided stability to the Arizona mineral exploration and development industries. It has worked well, and is fully consistent with the Jones Act and the 1936 amendments to the Enabling Act. Similarly, the long-established leasing acts of other western states, such as Alaska's leasing system, should be accorded deference.

6. The 1951 Enabling Act Amendments Did Not Affect the Leasing of Nonhydrocarbon Minerals

There is also no evidence that the 1951 Enabling Act amendments, Pub. L. No. 82-44 (1951), had any effect whatsoever on the leasing of any minerals, whether the minerals were on mineral lands originally granted by the Jones Act or nonmineral lands granted by the Enabling Act. The 1951 provision that notes that hydrocarbon leases are exempt from the auction and appraisal requirements of the Enabling Act cannot be interpreted to mean that these requirements were somehow mysteriously affixed to the leasing of minerals found on lands previously granted by the Enabling Act. The 1951 Act dealt with hydrocarbons only. The exploration for and development of hydrocarbon deposits is a very different sort of business compared to hard rock minerals. While both are high risk ventures, the actual mining of hard rock minerals is usually much more capital intensive over the long term. As such, royalty structures differ between the two industries. The 1951 Act did not attempt to cover types of businesses.

7. Related Congressional Legislation Also Supports the Argument That the Enabling Act's Leasing Restrictions Never Applied to Mineral Deposits

Another piece of congressional legislation also supports the assertion that the appraisal and auction requirements do not apply to mineral deposits. In 1922, the New Mexico Supreme Court held that those requirements were not applicable to New Mexico's leasing of its trust lands for mineral purposes. *Neel v. Barker*, 204 P.205 (N.M. 1922). There was, however, some uncertainty over the

vitality of this decision. As a result Congress subsequently passed the Act of February 6, 1928, 48 Stat. 58, which confirmed the New Mexico court's interpretation of the New Mexico-Arizona Enabling Act. Because the question arose with respect to a New Mexico decision, however, the 1928 legislation only referred to conditions in the state of New Mexico. Nonetheless, if Congress did *not* agree with the court's interpretation of the Enabling Act, it would have overturned it, rather than affirming that decision. This is powerful evidence of what Congress intended the language of the Enabling Act to mean.

D. Legislatively Derived Mineral Leasing Systems Provide Maximum Returns to the States

1. Mineral Deposits Do Not Lend Themselves to Appraisal and Auction Requirements

There are fundamental differences between the leasing of buried mineral deposits and the leasing of ordinary land. An appraisal and auction requirement for mineral deposits would be extremely illogical for the leasing of minerals, especially when the value of a mineral deposit cannot be readily determined in advance of exploration, bulk sampling, and testing. An appraisal and auction system would stifle incentives for exploration and development. There is no indication that Congress meant to impose such a system on the leasing of mineral deposits.

Respondents, Kadish, *et al.*, argue that an appraisal requirement for hard rock mineral deposits would not be particularly cumbersome. Yet, the delineation and development of the average hard rock mineral deposit involves the exploration of and rejection of many score other prospects, tens of millions of dollars in exploration,

geophysical, drilling, environmental, and geochemical and beneficiation study costs, and at least a decade of concerted effort. *See, e. g.,* Peters, *Mining and Exploration Geology, passim* (1978). Only after this monumental effort does a mining company know whether or not a deposit is a viable project. Unlike the assessment of a near surface sand and gravel deposit where costs and value can be more or less accurately determined in advance, it is simply impossible to "appraise" the value of a metal or other valuable mineral mine in advance of such exhaustive study. Most significantly, *no* such exploration and development studies would ever be undertaken in the first place if a mining company could subsequently lose the deposit simply by being outbid at a public auction.

2. The Arizona Legislature Created a Fair and Equitable Mineral Leasing System That Maximizes Returns to the State

Contrary to allegations, Arizona does not "give" away free minerals. It collects hundreds of thousands of dollars from prospecting permits alone and miners spend $10 to $20 in assessments per acre.[5] By calculating the mineral royalty against "net" value, the state provides an incentive to keep income flowing to the state even in times of low mineral prices. This prevents premature mine shutdown and provides continuity in mineral development. For those rare instances where the net value is very low or

---

[5] In 1986, this figure was $303,873, in 1987 the figure was $172,396, in 1988 it was $120,471. See letter of Robert Larkin to James Sullivan of November 1, 1988, attached hereto as Exhibit 1. Prospecting permits are issued in accordance with Arizona Revised Statute §§ 27-251, *et seq.*

zero, the state is still not "giving" away minerals because the value of a mineral cannot be segregated from the unavoidable costs of extracting that mineral.

The legislatures of both Arizona and Alaska distilled their mineral leasing statutes into systems that maximized incentives to develop the state's mineral lands while ensuring a fair return, measured in both direct revenues and gross economic activity to the states. The legislative process is never simple, and it never satisfies all the parties. Nevertheless, because the systems were created "as the State legislature may direct," and because the legislatures have been careful to balance competing interests, any attempt to second-guess these legislative decisions must be carefully scrutinized.

Congress declined to dictate specific leasing provisions for minerals granted under the Jones Act. The only requirement found in the applicable federal statutory law is that the minerals on such lands be leased "as the State legislature may direct." In Arizona the legislature interpreted this to allow it to set up a leasing system with 5% royalties and provisions to reward prospectors with the fruits of their exploration labors. The Arizona provision for a 5% net royalty[6] lease provides incentive to the development of a small minerals industry for the maximum benefit of the school trust.[7]

---

[6] See Ariz. Rev. Stat. § 27-234 (1987).

[7] In Alaska the state legislature interpreted this to be a broad grant of authority, and the legislature enacted a lease-location provision designed to encourage the exploration and development of mineral resources in Alaska. This had provided a substantial boost to the stated goal in the Alaska Constitution of settling the lands of Alaska while providing an economic base and production license revenues.

The Arizona Supreme Court examined a report from the Arizona Auditor General and decided that if Arizona raised its lease rates, it could gain higher state revenues. The report was flawed. For example, it neglected to account for the differences between different mineral commodities. It neglected to note that states with higher royalty rates often had the lowest overall revenues from mineral leases. The *Kadish* dissent by Justice Cameron recognized some of these fallacies when he noted that "the legislature has properly determined that a fixed-royalty rate appropriately maximizes the revenues to be generated by mineral leases on the school lands." ASARCO petition appendix at 36a, *Kadish;* 747 P.2d at 1200.

For example, GSA first applied for prospecting permits in 1982 and it has mined some of these leases for industrial minerals since 1986. A substantial commitment of resources has been expended to develop and operate these leases. Continued operation of these leases is crucial to the company's ability to utilize these investments and quite possibly to its very existence.

In addition to the acres under lease, GSA's owners have 255.72 acres covered by prospecting permits which it is attempting to convert to leases pursuant to Arizona Revised Statute § 27-254 (Supp. 1987). It has already paid for the right to prospect on this land anticipating that if its exploration efforts were successful, it would have a right to lease the land. GSA would not have pursued any exploration on these lands without assurances that it would also have the right to mine the minerals it had located. Nor could GSA have prudently explored on the state lands without knowing what its royalty payments would be in advance.

Courts are *not* appropriate economic policy decision making bodies. It is not the role of courts to determine what particular leasing scheme will provide for the maximum benefit to the State of Alaska or the school trust of Arizona. The courts are simply ill-equipped to deal with the sort of complex problems that are the province of the state legislative bodies. That is precisely why Congress provided that the leasing systems for mineral lands in the western states should be as the *legislatures* may direct. Congress did not provide any role for the courts to second-guess these legislative decisions.

E. Congress Did Not Intend To Infringe Upon Arizona's Sovereignty

The creation of the State of Arizona was not a case where the federal government has merely granted a favor or gift to an individual with strings attached, in which the strings must be taken, as the "bitter with the sweet." *Arnett v. Kennedy,* 416 U.S. 134 (1974). Rather it is a case where the federal government is imposing conditions on one of the most fundamental of attributes of sovereign state government: the state's right to exercise unfettered jurisdiction over all of its property no matter what the source. The hyperspecific conditions on the leasing of state lands found in the Arizona Enabling Act, as interpreted by the Arizona court, would be repugnant to the concept of independent sovereign state government. The original enabling act restrictions were, perhaps, enacted because of the federal government's legitimate paternalistic concern over the way certain states managed their lands. This concern, however, does not necessarily justify the infringement on independent state decision making as found in the 1910 Enabling Act.

Fortunately, the issue of the objectionability of the 1910 Act need not concern this Court. Because the Jones Act, rather than the 1910 Enabling Act, governs the disposition of mineral lands, only the much less intrusive conditions of the Jones Act are of concern to mineral lands. The Jones Act wisely left it to the state legislature to establish a mineral leasing system.

—o—

CONCLUSION

The United States Congress gave to the legislatures of the western states the discretion to create their own mineral leasing systems. These systems are designed by the state legislatures to best meet state needs. They are tailored for local concerns. The Arizona Supreme Court incorrectly determined that Congress placed additional strictures on the mineral leasing requirements. This, naturally enough, has implications for a number of western states, not to mention the holders of mineral leases in Arizona and other states.

It is respectfully submitted that this Court should find that the Arizona Enabling Act and the Jones Act do not severely restrict the means by which the State of Arizona can lease its mineral lands. Rather, the decision below should be reversed and the state legislature remain

free to fashion a leasing act that best meets the needs of Arizona's schools.

DATED: November, 1988.

Respectfully submitted,

Of Counsel

JAMES S. BURLING
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ROBIN L. RIVETT
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Amici Curiae

EXHIBIT 1

Arizona
State Land Department

1616 West Adams
Phoenix, Arizona 85007

Rose Mofford
Governor

M J Hassell
State Land Commissioner

November 1, 1988

James P. L. Sullivan
Arcadia Water Company
7009 East Camelback
Scottsdale, AZ

Dear Mr. Sullivan:

In an effort to respond to your recent verbal questions, the following information is offered:

1. Title 27 of the Arizona Revised Statutes indicates that our prospecting permit program began in 1961.

2. The 1980 performance audit of this agency by the office of the Auditor General primarily addresses mineral royalties, the grazing formula and the issue of trespass. The only reference to prospecting permit income that I could find is in Table 3 on page 8 (enclosed).

3. Rental received by the Department from prospecting permits in fiscal year 1986 was $303,873; in 1987 was $172,396; and in 1988 was $120,471. There were 76, 110 and 98 *new* prospecting permits issued in each of those years, respectively. As we discussed, there are currently 386 existing prospecting permits.

Enclosed is additional information regarding the prospecting permit program.

Sincerely,

/s/ Robert Larkin
Robert A. Larkin, Manager
Nonrenewable Resources & Minerals

RAL:ig
cc
Enc.